IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner

vs.

DIVISION OF STATE LANDS
(of the State of Oregon)
WILLIAM S. COX, DIRECTOR

Respondent

On Petition for Writ of Certiorari
to the Supreme Court [or the
Court of Appeals] of the State
of Oregon

REPLY BRIEF OF PETITIONER
[to Brief for Respondent in Opposition]

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PETITIONER'S REASONS FOR GRANTING PETITION FOR WRIT RESTATED
(for convenient reference)

Respondent in his brief in opposition to the Petition for Writ has con-

fined himself to only one point, namely to the allegation that "Petitioner has failed to state substantial reasons why this Court should grant a writ of certiorari." (p.2) He then, in his own "capsule form", severely understates petitioner's reasons for granting the writ and fails to mention two of the most compelling ones. To best and most readily demonstrate this, petitioner's reasons granting the Petition for Writ are restated here as summarized on the first two pages of the Index to the Petition for Writ:

1. Substantial rights of nationals of two foreign nations, Bulgaria and the Soviet Union, are directly involved in this case [The Adam Sharpek estate].

2. Substantial rights of the nationals of several other foreign nations are indirectly involved in this case, as are property rights of great aggregate value.

3. The questions and issues presented and the manner in which they are resolved in this case will have a serious impact upon the foreign relations of the United States.
[Note—The retrospective effect to be given to a decision of this Court striking down an unconstitutional statute, squarely presented in this case and extensively argued herein, is also a question of great domestic interest and importance with the potential for nation-wide impact].

PETITIONER'S REASONS FOR GRANTING WRIT NOT COVERED BY RESPONDENT'S BRIEF IN OPPOSITION

The reasons not discussed in respondent's brief in opposition, are 1) that the manner in which the questions and issues here presented and the manner in which they are resolved will have a serious impact upon the foreign relations of the United States, and 2) that the retrospective effect to be given to a decision of this Court striking down an unconstitutional statute is a question of great domestic interest and importance

with the potential for nation-wide impact. A reading of the quite brief opinion of the Oregon Court of Appeals (App. A, pp. 1a-10a to the Petition for Writ) will confirm that that court also did not address itself to these vitally important issues. It may not be unfair to suggest and assume that neither the court nor respondent could find grounds for negating petitioner's position and arguments on these issues.

At page 3 of his brief in opposition respondent denies the correctness of petitioner's "assumption" that she "is or was the rightful owner of the property which was once the estate of Michael Chongorsky". It is elementary Hornbrook law that in the case of intestacy title to the assets of a decedent's estate vests in the heir or heirs at the instant of death, subject of course to

debts, taxes, costs of administration and any lawful, valid conditions that the law may impose and that might result in defeasance of the title. Here it was the State of Oregon that by its affirmative action, that is by the filing of its Petition for Finding and Order of Escheat (Pet.p.13), sought to take away petitioner's right of inheritance as the decedent's nearest relative and heir at law solely on basis of a statute (ORS 111.070) which this Court subsequently struck down as unconstitutional in Zschernig v. Miller, 389 U.S. 429 (1968). As the original Assistant Attorney General so correctly said in his letter of August 18, 1976 (App. F, pp. 33a-34a to the Petition for Writ):

> "However, with reference to the question of escheat, it does appear that the U.S. Supreme Court decision entitled Zschernig vs. Miller, 389 US 429 (1968) does

> apply to this situation. Therefore, the order of escheat under the statute, ORS 111.070, was not constitutional. Therefore, it is our opinion that the estate should have been probated as any other estate."

This clearly and correctly recognized the retrospective effect of this Court's invalidation, ab initio, of the statute as unconstitutional. This point was intensively argued at pages 16 to 23 of the Petition for Writ, including the citation, quotations from and discussion of four landmark decisions by this Court clearly demonstrating that under the facts of this case retrospective effect is to be given to the invalidation of the statute and rights wrongly, unlawfully taken away are to be restored. All this respondent blandly dismisses without any explanation other than to say that "petitioner's counsel has ably and zealously urged a sympathetic result

based on equity". It is very true that this petitioner seeking to have restored to her what was wrongfully taken from her on authority of a statute unconstitutional and invalid from the date of its enactment is indeed an appeal in equity. No further argument need be offered on this point than to invite perusal once again of the quotations from Chief Justice Burger's opinion in Lemon v. Kurtzman (II), 411 U.S. 192, set forth at pages 22-23 of the Petition for Writ.

This Court is asked to hold that ORS 116.253 (formerly ORS 120.130), the statute which provides that no one who has had notice or knowledge of the original escheat proceeding may make claim to the escheated property, bars this petition for reclaiming the inheritance wrongfully taken from her solely on basis of an unconstitutional, void

statute. To do so would clearly be an unconstitutional application of that statute under the particular facts of this case. It would be nothing other than the State of Oregon taking her property from her without due process of law, without compensation, in effect by confiscation.

THE HORMAN CASE

Once again, this time at pages 5 and 6 of his brief in opposition, respondent argues that the decision of a California District Court of Appeal in Estate of Horman, 5 Cal.3d 62, 95 Cal. Rptr. 433, 485 P2d 785 (1971) [cert. denied sub nom. Gumen v. California, 404 U.S. 1015 (1972)] is comparable to this case. In candor it should be said that the Oregon Court of Appeals indicated a concurrence in this view. (App. A, p.5a-6a). However a careful reading

of that opinion will confirm that at issue was the constitutionality of Section 1026 of the California Probate Code which required that all non-resident alien heirs to an estate in California must "appear and demand" their rights of inheritance within five years from the date of death of the estate leaver. The court held that the statute was constitutional as it applied without regard to the country of the alien heir's residence (unlike the so-called "iron curtain" reciprocal inheritance rights statutes such as Oregon's § 111.070 or California's § 259). And the Court further held that the statute—that is the five year requirement—was not tolled during the years between Estate of Gogabashvele, 195 Cal App 2d 503, 16 Cal Rptr 77, decided in 1961, and Estate of Larkin, 65 Cal 2d 60, 52 Cal Rptr 441, 416 P2d 473, decided in

1966. In Gogabashvele it was held on a voluminous record of written and documentary evidence as well as the testimony of experts in Russian law that reciprocal rights of inheritance did not exist between the United States and the Soviet Union as required by § 259 of the California Probate Code and escheated the estate to the State of California, exactly, by the way, as the Adam Sharpek estate, also involved in this case, in which the Russian beneficiaries' inheritances were escheated to the State of Oregon. In Larkin, on an even more voluminous record, including the testimony of a most imposing array of experts in Russian law, it was held that reciprocal rights of inheritance did exist between the United States and the Soviet Union and the estate went to the Russian heirs rather than the State of California.

There is simply no basis for contending that the Horman case is comparable to or has any bearing upon this Chongorsky (or the Sharpek) case. We are here concerned with the retrospective effect to be given to a decision of this Court striking down an unconstitutional statute. It may, however, be pointed out that the exhaustive Gogabashvele and Larkin opinions reflect that not a single expert witness on Russian law on either side testified, nor was there a shred of evidence showing that either the government or any governmental agency or political subdivision of the U.S.S.R. ever confiscated a ruble, kopek, dollar or cent of the inheritance of a single American heir to an estate in the Soviet Union.

CONCLUSION

Petitioner is confident that her

Petition for Writ sets forth ample, indeed compelling reasons why the writ should be granted. Bluntly stated, there is here a case where a state of this union has taken away and unto itself for its own enrichment the inheritance of a resident and national of Bulgaria, in the companion Sharpek estate the inheritances of a number of residents and nationals of the U.S.S.R., solely and only on basis of a statute which this Court subsequently held to be unconstitutional and void. The rightful heir thereupon demanded restitution of her property which the state has refused. It has been clearly demonstrated that this is in direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 18, of the Constitution of the State of Oregon. The state's refusal to disgorge the escheated fund

is, in its final essence, confiscation of the petitioner's property. That such conduct cannot but have a grave impact upon the relations of the United States with the foreign governments involved is self-evident. Directly applicable here are the solemn declarations of this Court in United States v. Pink, 315 U.S. 203, 232 (1942) that:

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. Chy Lung v. Freeman, 92 U.S. 275, 279-280. Certainly, the conditions for 'enduring friendship' between the nations, which the policy of recognition in this instance was designed to effectuate 'are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.'"

and in Hines v. Davidowitz, 312 U.S. 56, 65 (1941) that:

> "One of the most important and delicate of all international rela-

> tionships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."

The Petition should be granted and Petitioner respectfully suggests that summary action by this Court as in Estate of Belemecich, 375 U.S. 395 (1964), would be a prompt, just and correct end to this litigation.

Respectfully submitted,

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